IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GERARDO MACIEL,
Appellant.

No. 2 CA-CR 2018-0283
Filed October 8, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201602085
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Eckerstrom and Judge Espinosa concurred.

E P P I C H, Presiding Judge:

¶1 Gerardo Maciel appeals from his conviction for participating in a prison riot, arguing that the evidence was insufficient to support his conviction and that he was deprived of a fair trial because the trial court admitted irrelevant exhibits that were unfairly prejudicial to him. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *See State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). Maciel was an inmate in the custody of the Arizona Department of Corrections at the Central Unit in Pinal County. Late one afternoon in April 2015, various inmates attacked several correctional officers in the prison cafeteria because they believed the officers were being disrespectful to them. Other correctional officers responded to an emergency alert triggered in the prison cafeteria.

¶3 Officer R.S., one of the responding officers, ran to the cafeteria, used his pepper spray once, and directed inmates to leave. He then began pushing inmates out of the cafeteria toward the prison tower. As R.S. approached the door to exit the cafeteria, Maciel entered and punched him in the lip. After a struggle, R.S. was able to handcuff Maciel.

¶4 In August 2016, a grand jury indicted Maciel on charges of prisoner participation in a riot and aggravated assault. After a three-day trial, a jury convicted Maciel of prisoner participation in a riot.[1] Maciel was sentenced to 15.75 years' imprisonment, to be served consecutively to the sentence he was already serving. We have jurisdiction over Maciel's timely appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

[1]The state dismissed the aggravated assault charge without prejudice after the jury could not reach a unanimous verdict on that charge.

Sufficiency of the Evidence

¶5 Maciel contends the trial evidence was insufficient to support his conviction. We review de novo whether sufficient evidence supports a conviction, and will reverse a conviction only if no substantial evidence supports it. *State v. Denson*, 241 Ariz. 6, ¶ 17 (App. 2016). "Substantial evidence is 'such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.* (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)). On appeal, we view the evidence and draw inferences in the manner most favorable to upholding the verdict. *Id.*

¶6 Section 13-1207(A), A.R.S., provides that "[a] person, while in the custody of the state department of corrections . . . who participates in a riot is guilty of a class 2 felony." The term "participate" is not defined by statute. When a term is not statutorily defined, we apply its common, ordinary meaning. *See State v. Takacs*, 169 Ariz. 392, 397 (App. 1991). "Participate" commonly means "[t]o be active or involved in something; take part." The American Heritage Dictionary 1285 (5th ed. 2011). Therefore, a prisoner violates § 13-1207(A) if he is actively involved or takes part in a riot.

¶7 "[Section 13-1207(A)] must be read in conjunction with A.R.S. § 13-2903, which creates the offense of riot." *State v. Manzanedo*, 210 Ariz. 292, ¶ 12 (App. 2005). Section 13-2903, A.R.S., provides that "[a] person commits riot if, with two or more other persons acting together, such person recklessly uses force or violence or threatens to use force or violence, if such threat is accompanied by immediate power of execution, which disturbs the public peace."

¶8 Maciel relies on *State v. Garland*, 157 Ariz. 246 (App. 1988), for the proposition that even had he been in the cafeteria when a riot started, his mere presence is insufficient to support a conviction for participation in a prison riot. However, this court made clear in *Garland* that "[w]hile mere presence will not support a charge of riot, a person must distance himself from the assembly when anyone in the group manifests an intent to engage in unlawful conduct." 157 Ariz. at 248 (citation omitted). "Failure to do so results in 'knowing participation in an assemblage which is creating an immediate danger of damage to property or injury to persons.'" *Id.* (quoting *Faulk v. State*, 608 S.W.2d 625, 631 (Tex. Crim. App. 1980)).

¶9 Not only did Maciel fail to distance himself from the rioting inmates, he actively became involved and took part in the riot by punching

R.S. At trial, R.S. testified that he was confident that Maciel was the person who had punched him in the lip. Officer D.C. confirmed he had seen Maciel and R.S. "fist fighting" each other during the riot and he believed R.S. was defending himself. D.C. recognized Maciel based on previous encounters at the prison and Maciel's distinctive features—a big tattoo on his forehead and glasses. It is the jury's role to weigh the evidence and determine the credibility of the witnesses, not ours. *See State v. Williams*, 209 Ariz. 228, ¶ 6 (App. 2004).

¶10 Maciel also claims there is insufficient evidence to support his conviction because there is no video footage of him being involved in a riot. However, witnesses testified the altercation between Maciel and R.S. had taken place out of the field of view of the prison's surveillance cameras. A Department of Corrections investigator confirmed there were not enough video cameras in the prison to capture every part of the riot due to budget constraints. Given the record before us, we find the evidence sufficient to support Maciel's conviction.

Relevance

¶11 Maciel next asserts that the trial court abused its discretion by admitting photographs showing injuries of five correctional officers who had been assaulted by other inmates during the riot. Maciel claims these photographs were not relevant to whether he had participated in a prison riot.

¶12 "We review evidentiary rulings for abuse of discretion and defer to the trial court's determination of relevance." *State v. Chappell*, 225 Ariz. 229, ¶ 28 (2010). Evidence that has any tendency to make a fact of consequence more or less probable is relevant and generally admissible. *See* Ariz. R. Evid. 401, 402. Photographs may be relevant even when "facts are not contested because 'the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'" *State v. Goudeau*, 239 Ariz. 421, ¶ 154 (2016) (quoting *Estelle v. McGuire*, 502 U.S. 62, 69 (1991)).

¶13 Although Maciel did not dispute that a riot had occurred, the state still had the burden to prove every element of the charge. This required the state to prove that a riot had taken place. *See* A.R.S. §§ 13-1207, 13-2903. Photographs showing the victims involved in the riot make it more probable that a riot took place and that two or more persons used violence to disturb the peace at this prison. *Cf. Manzanedo*, 210 Ariz. 292, ¶ 12 ("[I]t is clear that a violation of § 13-1207 is not a victimless crime.").

Therefore, the trial court did not abuse its discretion in concluding the photographs were relevant.

Rule 403

¶14 Lastly, Maciel argues the photographs of injured officers were unfairly prejudicial to him because they showed much greater injuries than the minor injury caused to Officer R.S. and therefore should have been excluded under Rule 403, Ariz. R. Evid. However, "[a] party must make a specific and timely objection at trial to the admission of certain evidence in order to preserve that issue for appeal." *State v. Hamilton*, 177 Ariz. 403, 408 (App. 1993); *see also* Ariz. R. Evid. 103(a). "[A]n objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds." *Hamilton*, 177 Ariz. at 408.

¶15 Maciel did not object based on Rule 403 at trial—he only objected to the photographs on relevance grounds. Therefore, Maciel forfeited review for all but fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 1 (2018). And because he has not argued that fundamental error occurred, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (concluding argument waived because defendant did not argue alleged error was fundamental).

Disposition

¶16 We affirm Maciel's conviction and sentence.